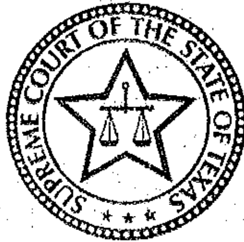

The Grievance Oversight Committee
Appointed by
The Supreme Court of Texas

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2008 - 2009

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Professional Liability Insurance Disclosure

At the request of the Court, the Committee submits this, its recommendation for insurance disclosure by Texas attorneys. This recommendation is based upon our study of the growing effort among states to provide a greater level of transparency and public protection for persons who have been harmed through the negligent acts of lawyers.

In developing this recommendation, members of the Committee first conferred with the original proponent of disclosure in Texas, Charles Herring. who first suggested the need for a review in a detailed submission to the Supreme Court. Committee members also conferred with the Chief Disciplinary Counsel, the Commission for Lawyer Discipline, the Board of Disciplinary Appeals, local Bar leaders, and members of the public. We spoke with Bar leaders in each of the three states that did not adopt the ABA proposal, and we reviewed correspondence sent to the State Bar by a few lawyers who expressed strong opposition to the proposal. We wish to express our appreciation to ABA Client Protection Counsel. John Holtaway, who participated in our November 2008 meeting and discussed the issues from a national perspective. A copy of the national survey prepared by Mr. Holtaway is attached to this recommendation. A member of the Committee attended the final meeting of the State Bar Task Force on Professional Liability Disclosure and later attended the State Bar Board of Directors meeting on April 25. 2009 where the report was reviewed.

Background Information:

The Committee understands that after the Court received a request by Austin attorney Charles Herring, the Court requested that the State Bar study the issue and recommend what action, if any, should be taken in response to the ABA recommendation and the movement in many states to adopt such requirements. Then State Bar President, Gib Walton, named a special Task Force that included a cross section of lawyers by practice area, and included a member of the public who served on the Bar Board. The Task Force was chaired by former State Bar President, David Beck. With financial support from the State Bar independent polling surveys were conducted of the public at large. and or individual attorneys on the question or whether Bar rules should require advance disclosure (prior to the representation or a client) by lawyers as to whether or not they maintain professional liability insurance coverage. As reported in a May 2008 article from the Austin American Statesman, 80% of the public felt that disclosures should be required. By nearly the same margin, approximately 70% of the lawyers polled felt that disclosure should not be required.

It should be noted, however, that before the polling was completed it appeared that the leadership of one Bar section lobbied its membership to oppose any effort to compel disclosure and urged its members to write Mr. Walton and the Task Force members to oppose, in the strongest of terms, the adoption of the proposal. Copies of a sample document complete with Talking Points were distributed electronically by that section. Copies of those letters were later made available to the Grievance Oversight Committee. No similar lobbying effort was apparently made by consumer or public interest organizations, although one speaker. Mr. Tom "Smitty" Smith of Public Citizen, was invited to speak at the final Task Force meeting.

The recommendations of the Task Force were presented to the Board of Directors of the State Bar in their Galveston meeting in 2008. There was no debate. and the Bar Board took no substantive position on the Task Force recommendation. Instead, the Board simply approved its submittal to the Court.

In their study and deliberations, the American Bar Association recommended the adoption of requirements for attorneys to disclose to potential clients whether the attorney maintains professional liability insurance coverage. As or December 2008, 24 states have adopted such a requirement, while leadership entities in three states have studied the issue and rejected such a requirement. According to an article published by Texas Lawyer's sister publication, Law.com, the Board of the State Bar of California recommended the adoption or their disclosure rule (16-4) in May 2008 only after an agreement was struck that provided a *de minimus* exception for attorneys who would bill a client for less than four hours or legal services.

Organizations in two states studied and rejected recommendations for disclosure. In Arkansas, the Board of Governors of the Bar recommended the adoption but their House of Delegates subsequently rejected adoption by a vote of 29-14 with 12 abstentions. The Kentucky Bar Association twice recommended the adoption or disclosure requirements directly to clients, but those recommendations were ultimately rejected by their Court. However, in the Kentucky example, attorneys practicing as LLC's are required to make public disclosure. An alternative proposal is now under review.

According to ABA statistics, five states (PA. AK. Nil, 01-1. SD) require disclosure directly to clients. Nineteen other states require attorneys to disclose their lack of malpractice insurance on annual registration statements (AZ, CO, DE, HI, ID, Il, KS, MA, MI, MN, NE, NV, NM, NC, ND, RI, VA, WA, and WV).

In the final meeting of the State Bar Task Force. the proposal. together with implementing rule language as drafted by Mr. Herring. was narrowly rejected in a 6-5 vote with the Chair having voted last, but having voted in support of the proposal. The June 11. 2008 Memorandum from Task Force Chair David Beck fairly describes the review process and summarizes the policy alternatives for supporters and for opponents of the disclosure requirement.

Issues Regarding Disclosure

There is considerable literature available through the ABA Center on Professionalism on the pros and cons of insurance disclosure. Indeed. in recommending a model rule. the ABA House of Delegates heard considerable debate on the topic before a model rule was approved in August of 2004. While the Grievance Oversight Committee conferred with members of the public, the State Bar's research is the only known independent survey of public attitudes on the requirements of disclosure (80% of Texans favor disclosure).

When reviewing the professional literature and the internal debate of the Task Force, the topic quickly diverts to the question of how should disclosure be conducted, how should it be monitored. and what sanctions should be imposed if a lawyer fails to follow the rules.

Furthermore, a number of technical questions arise as to what protections are in fact available to the public when a lawyer claims to be "fully covered" – for example. does a policy that has a very high deductible, or that has a low ceiling on maximum claims, count as coverage? Should the attorney who drops coverage be required to timely notify the State Bar and potentially affected clients? Should disclosure requirements extend to lawyers who are not primarily engaged in private practice, such as government lawyers or the law professor who might offer a courtesy opinion at a cocktail party, or to a friend or former student?

From the public perspective, the question is asked why the public is mandated to maintain insurance for public protection if they own and drive a car and why lawyers should not be held to the same standard. From a consumer viewpoint. businesses are regularly required to disclose financial status under SEC requirements. Insurance companies arc required to disclose information on claims paid experience (www.tdi.state.tx.us), and Medicare has recently simplified comparison shopping of hospitals and care facilities by requiring disclosures on costs. treatment effectiveness. and risks for individual institutions (www.medicare.gov). In informal anecdotal surveys. many members of the public seem to presume that because lawyers are licensed they are protected, because they assume lawyers have adequate malpractice insurance coverage.

One of the talking points submitted by a few lawyers to the Task Force was that other professions are not held lo the same standards as lawyers. if lawyers were made to disclose. It was noted that no professional liability insurance, or disclosure, is mandated of plumbers, dentists, accountants, or similar trades or professions. The Committee notes that while physicians are not mandated by law in Texas to have coverage. or disclose whether they do or do not have coverage, the requirements for staffing privileges in hospitals in fact reach a higher requirement for public protection. Those doctors who admit patients are normally mandated by the hospitals to maintain professional liability coverage (see standardized credentialing requirements set forth by TDI at www.tdi.statc.tx.us/forms/lhlhmo/lhI396credihcp.pdf)

Opponents of disclosure sometimes suggest that they would be obligated to inform the client of their liability coverage if the new client were to ask the question. They then acknowledge that it is a rarity, if ever, that the c1icnt asks about it, and that by the time the retainer agreement is prepared, the client has typically already incurred fees.

Disclosure requirements vary among the states. Those states with the most effective disclosures require that it either be posted in the lawyer's office or in a retainer agreement (much like the Texas Bar requires disclosure to clients for lawyer grievances relief) One state, South Dakota, requires that the information be published on the lawyer's letterhead. Several states require disclosure on websites and on the Bar's website *If the lawyer does not have minimal coverage.* Most proponents of disclosure readily admit that they believe that disclosure requirements will lead to greater public protection by providing lawyers with an incentive to maintain liability protection. Only the state of Oregon has a comprehensive rule that mandates actual insurance coverage in order to practice law (similar to MCLE requirements).

Types of Coverage for Disclosure and Affordability

One of the concerns raised by a few lawyers is that the insurance may not be affordable, particularly by new members or the Bar who are not part of a large practice group. While the business of the Bar's disciplinary arm is public protection consistent with ethical conduct. and not trade protection. we reviewed the policies that are available and considered whether a risk-pool
or similar entity should be created to ensure uniform access to liability coverage. We also observed a very informal survey of Task Force members each of whom were asked what they pay for coverage. From that informal survey, it appeared that those lawyers (at the table) each paid approximately $4000 per year.

Following up on that topic of coverage and insurability, a committee member interviewed the Texas Lawyers Insurance Exchange President, John Randolph. about standard policies and costs. TLIE is the largest insurer in Texas of solo and small firm practitioners and has been insuring Texas lawyers for over 25 years. We were told that policy premiums vary based on practice area and whether the attorney is practicing on a full time basis. The highest premiums are charged for lawyers who engage in securities work. intellectual property law. and personal injury law (areas that often require some significant post law school experience, or work in a large firm setting).

As a non-profit insurer with its board elected by the policyholders, TLIE makes available special rates for new lawyers with first year policies at $500 yearly for coverage of $100,000 per claim, to a maximum policy level of $300,000 for multiple claims. The TLIE new lawyer program ramps up to the rates over time so that by year four of the attorney's practice, the standard premium would be $1750. or about $7 per workday. Mr. Randolph stated for the lawyer with a record of multiple disciplinary actions, or malpractice claims, TLIE would not extend coverage. but other companies are available. He added in his response that premiums for those lawyers could be costly.

The Committee also learned that the Membership Committee of the State Bar Board of Directors is reviewing the potential for the procurement of a preferred provider for professional liability insurance. This would presumably be accomplished through some type or bidding process. and that a preferred provider would be promoted by the Bar and offer favorable underwriting policies at very competitive rates. As one apparent measure of affordability, all attorneys in Oregon have been required to maintain malpractice coverage at minimum limits through a Bar sponsored pooling arrangement known as the Oregon Professional Liability Fund. The average premium per lawyer in 2003 was $2000 annually.

Lastly. we examined malpractice premiums for lawyers who are covered under the State Bar's insurance plan, offered free to lawyers who arc employed full time by Legal Aid organizations. While nearly half their practice is in the field of family law, Legal Aid attorneys work in many forums and practice in complex fields including consumer law, public benefit law, mortgage foreclosure, and public utility law. The State Bar maintains a master policy for covering Legal Aid organizations and pays the premiums after seeking competitive bids.

Based on the above review. the Committee believes the State Bar should proceed with its efforts

to seek better terms through competitive solicitations. In light of the above research. We challenge that the mere addition of a disclosure requirement would force lawyers out of business.

Recommendation

The Committee, having studied the recommendations of the State Bar's Task Force on insurance disclosure, and having reviewed how other states have addressed these same issues, and after having studied the cost and availability of professional liability insurance in Texas, recommends that the State Bar of Texas, at the direction or the Texas Supreme Court, implement a Professional Liability Insurance Disclosure rule. The rule, the Committee believes, should be made a part of the Disciplinary Rules of Professional Conduct so that any violation of the rule will be handled through the grievance process, and any such rule should embody at least the following provisions:

- At the time a client engages a lawyer, the lawyer should have a duty, if the lawyer does not have a professional liability insurance policy with limits acceptable to the Bar (for instance insurance in an amount of at least $100.000 per c1aim and $300.000 in the aggregate) to inform the client in writing of this fact.

- If during the representation an insurance policy in effect with the prescribed limit lapses, or is terminated, the lawyer should have the same duty to supply notice to the client of this fact.

- The Bar. as approved by the Supreme Court. should prescribe the form of notice in these circumstances so that clients get standardized notices.

- The rule should only apply to a lawyer practicing *for* the public (e.g. not a full-time judge, in house corporate counsel, or lawyers working full-time for a government agency, etc.).

- The rule should prescribe that the required written notice should be signed and acknowledged by the client and that the acknowledgement should be kept by the lawyer for a term of years specified by the Bar.

- The rule should prescribe that the minimum limits of insurance specified by the rule include any deductible or self-insured retention amounts which must be paid as a precondition to the payment of coverage available under the professional liability insurance policy.

- The rule should also specify that the rule would be violated if a lawyer, or firm employing a lawyer, either knows, or has reason to know, that the deductible or self-insured retention amount cannot be paid in the event of loss.*

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* The Committee acknowledges that the state of New Mexico has proposed a plan that contains similar requirements to the ones outlined in the Committee's recommendations. See New Mexico Bar Bulletin, March 2, 2009, Volume 48, No, 9, at pages 19 & 20. The Committee also found helpful the Q&A section discussion (If the New Mexico disclosure rule in the same Bar Bulletin at page 7, et. seq. In fact almost every question posed by both the Texas State Bar's Task Force, and those additionally considered by the Committee, were satisfactorily addressed in this Q&A section.

Excerpt from the Grievance Oversight Committee 2009 Report to the Supreme Court

In making this recommendation, the GOC considered not only the issues raised and comments made by the State Bar's Task Force on Insurance Disclosure, but also obtained added input from both the public at large and grievance governance volunteers, as the Committee traveled around the State in its efforts to compile its annual report to the Texas Supreme Court. The recommended procedure will allow lawyers the confidentiality or the client conference to disclose to the client why the lawyer does not maintain a minimum amount of professional liability insurance. No public posting will be required and each lawyer will have the opportunity to explain to his or her client the reason that such minimums are not carried. The lawyer who carries, and maintains, the insurance minimums {including deductible and self-insured retention amounts} will have no disclosure requirements or form retention requirements.

To implement new specific rules for insurance disclosure that will work for Texas attorneys, the Committee recommends that the Supreme Court appoint a Professional Liability Insurance Disclosure Rule Committee (PLlDRC).

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The GOC believes that this insurance disclosure rule drafting committee should minimally contain representatives from the Commission for Lawyer Discipline, the Chief Disciplinary Counsel's office, the Board of Disciplinary Appeals, the State Bar Board and the President and President Elect of the Bar. The GOC also believes there should be an appropriate number of public members appointed to ensure that the interest of the public in such disclosure will be appropriately considered. The GOC believes in addition to drafting rules to specify disclosure as outlined in our recommendation. PLlDRC should recommend to the Court the appropriate minimums of insurance coverage and explore the possibility of the State Bar making affordable professional liability insurance available for small firm and solo practitioners. The GOC believes that the proposed disclosures take into consideration the special needs of the small firm and solo practitioners. These disclosure requirements will effectively preserve and protect each attorney's opportunity to discuss privately with a prospective client the availability. or necessity of. insurance protection without creating a marketing disadvantage for those attorneys who may choose not to obtain professional liability insurance coverage.

Every member of the GOC. while not unanimously supporting every facet of this Recommendation, agrees that it best captures the Committee's desire to effect a change that can have a positive impact on the delivery of information to the consuming public about legal services.